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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1194

ALICE MARTENS YOUNG, ETC.,
Petitioner,

vs.

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

ROBERT M. RIESER,
JOHN WATTAWA,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1194

ALICE MARTENS YOUNG, TOWN OF MADISON, DANE COUNTY, WISCONSIN, INDIVIDUALLY, AND ALSO ON BEHALF OF HERSELF AND ALL OTHER PERSONS AS A CLASS HOLDING STOCK IN THE MISS-WIS TIMBER AND LAND CO. AT TIME OF ITS DISSOLUTION,

Petitioner,

vs.

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, DEPARTMENT OF AGRICULTURE, THE MALL, BETWEEN 12TH AND 14TH STREETS, S. W., WASHINGTON, D. C.; E. H. WIECKING, LAND USE COORDINATOR, SAID DEPARTMENT OF AGRICULTURE; WILLIAM A. JUMP, DIRECTOR, OFFICE OF BUDGET AND FINANCE, SAID DEPARTMENT OF AGRICULTURE; RAY WARD, DIRECTOR, DIVISION OF PURCHASE, SALES AND TRAFFIC, SAID DEPARTMENT OF AGRICULTURE; JAMES N. CLINE, JR., ACTING CHIEF, GENERAL CONTRACTING SECTION, DIVISION OF PURCHASE, SALES AND TRAFFIC, SAID DEPARTMENT OF AGRICULTURE; L. F. WATTS, CHIEF, FOREST SERVICE, SAID DEPARTMENT OF AGRICULTURE; L. F. KNEIPP, ASSISTANT CHIEF, LANDS DIVISION, FOREST SERVICE, SAID DEPARTMENT OF AGRICULTURE; ROBERT H. SHIELDS, SOLICITOR, SAID DEPARTMENT OF AGRICULTURE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and the Associate Justices:

Alice Martens Young, petitioner, prays for the issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia,

entered January 6, 1947, in this cause, its number 9292 (R. 80), affirming a judgment of the District Court of the United States for the District of Columbia. The opinion of the Court of Appeals appears in the record herein (R. 76-79), and is not yet reported.

Questions Presented

Is the United States a necessary party when it is alleged, not unsubstantially, that title to the lands involved never passed to the United States, but remained in those for whom petitioner sues, because of the unconstitutionality of the Weeks Act, under which all acquisitions were purported to have been effected?

Alternatively, and assuming Weeks Act constitutionality, is the United States a necessary party in a suit to declare acts of officers of the United States unlawful and to grant incidental relief when it is alleged, and appears, that such officers have failed to observe the legal requirements declared by that Act to be indispensable conditions precedent to permit them to acquire lands in the name of the United States?

Did the Court err in holding that the Mississippi Act (R. 51) conformed to the requirements of the Weeks Act?

Did the Court err in failing to hold the Mississippi Act (R. 51) unconstitutional under the Mississippi Constitution?

Is the Court's ruling in conflict with applicable decisions of this Court?

Statutes Involved

United States Code, Title 16, Section 513 (R. 18), Sections 515-520 (R. 18-22), particularly the following portions of said Sections:

> "The Secretary of Agriculture is authorized and directed to examine, locate, and recommend for pur-

chase such forested, cut-over, or denuded lands within the watersheds of navigable streams as in his judgment may be necessary to the regulation of the flow of navigable streams or for the production of timber, and to report to the National Forest Reservation Commission the results of such examination; but before any lands are purchased by the Commission, said lands shall be examined by the Secretary of Agriculture, in cooperation with the Director of the Geological Survey, and a report made by them to the Commission showing that the control of such lands by the Federal Government will promote or protect the navigation of streams, or by the Secretary of Agriculture showing that such control will promote the production of timber thereon." (Section 515, R. 18, 19)

"The Secretary of Agriculture is authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said Commission.

"No deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this Section until the Legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States *for the purpose of preserving the navigability of navigable streams* . . ." (Section 516, R. 19)

Section 6058, Mississippi Code, 1930 (R. 51), particularly the following portion thereof:

"The consent of the State of Mississippi is hereby given to the acquisition by the United States by purchase or gift of such land in Mississippi as in the opinion of the Federal Government and the State Forestry Commission may be needed for the establishment of a *national forest or forests or reclamation or colonization projects in this region.*" (R. 51)

(The emphasis supplied in the Statutes above is to enable ready comparison between the requirements of the

Weeks Act for legislative consent by the State of Mississippi, and the nature and extent of the action taken by the Legislature of Mississippi.)

Jurisdiction

This Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Chapter 229, 43 Stat. 936), and by virtue of alleged violation of the United States Constitution, and in conformity with Rule 38 of this Court, Section 5, Sub-paragraphs (b) and (c).

Petitioner's timely petition for rehearing (R. 81-89) was denied by the Court of Appeals January 22, 1947. (R. 89)

Statement of the Case

(a)

For the purpose of a Motion to Dismiss, all of the well pleaded facts appearing in the Complaint are deemed to be true. *Ickes* v. *Virginia-Colorado Development Corporation,* 295 U. S. 639, 55 S. Ct. 888, 79 L. Ed. 1627; *Ickes* v. *Fox,* 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525; *State of Oklahoma* v. *Guy F. Atkinson Co.,* 37 F. Supp. 93, 96, affirmed 313 U. S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487.

(b)

The enactment of the Weeks Act was preceded by examination and inquiry by Congress into the constitutionality of this type of law. (House Committee Report No. 1514, 60th Congress, 1st Session, Resolution No. 365; See Appendix to Brief herewith.) It was this serious doubt as to the constitutionality, and the apprehension of Senators and Representatives concerning the clashing of two sovereignties within a single State, and the possible loss of large tax revenue, that motivated the deliberate in-

clusion of the provision requiring consent by the State legislature "for the purpose of preserving the navigability of navigable streams." (Section 516, Title 16, United States Code; R. 19)

Even with such inclusion, validity was questioned thereafter on the Floor of Congress. (*Congressional Record*, House, Vol. 45, Part 8, 61st Congress, 2d Session, pages 8987, 8989, 8994, 8996, 8997, 9017; *Congressional Record*, Senate, Volume 46, Part 3, 61st Congress, 3rd Session, pages 2578, 2582, 2586, 2587) As late as 1934, Congress reaffirmed the necessity for such legislative consent, by requiring at least substantial compliance in the form of affirmative action by the Legislature or specific acquiescence by the members of the Legislative body. (Act of June 14, 1934—48 Stat. 955, Chapter 511; See Appendix to Brief herewith.) The Legal Department of the State of Mississippi have also expressed doubt as to the validity of the procedure now challenged in this proceeding. (*Official State of Mississippi 1944* Pamphlet "Mississippi Land Purchases by Federal Government—Statement by Gov. Thos. L. Bailey, and Attorney General's Opinion to the Governor"; See Appendix to Brief herewith.)

There has been no controlling decision respecting (a) validity of the Weeks Act, (b) sufficiency of the methods employed herein to conform to this Act, (c) adequacy of the consent accepted by the Secretary of Agriculture, (d) validity of the Mississippi Statute relied upon.

Moreover, the decisions in this Court relied upon by the Court of Appeals (*Morrison* v. *Work*, 266 U. S. 481; *New Mexico* v. *Lane*, 243 U. S. 52; *Louisiana* v. *Garfield*, 211 U. S. 70; *Naganab* v. *Hitchcock*, 202 U. S. 473) do not sustain the conclusions of that Court.

In 1934, the then Secretary of Agriculture, indicated desire to acquire, under the Weeks Act, certain lands in Mississippi owned respectively by petitioner and by Miss-

Wis Timber and Land Co., a corporation dissolved in 1938. (R. 7, 3) In the ensuing discussions, the Secretary's agent advised that unless petitioner and the Company so sold, their lands would be taken through condemnation, and further, that in such acquisitions in that area, all grantors would be treated equally in the matter of mineral rights, in that none would be permitted to reserve the same for longer than ten years. (R. 7) As petitioner and the Company were financially unable to litigate with the United States, they executed options for the lands as requested. (R. 7, 8) Recently it has been learned that certain others whose lands in Mississippi were then also acquired, were granted mineral reservations therein for 30, 50, or 100 years, or even in perpetuity. (R. 7)

In December 1935, and in June and July 1936, following exercise of its option at $3.60 per acre, the Company transmitted deeds for the United States for approximately 14,750 acres in Mississippi, with reservation of mineral interests for ten years from July 1, 1935, the Secretary, in May 1937, obtaining condemnation for about 2,245 more acres of the Company in that State at about $3.60 per acre, with like reservation of mineral interests. (R. 9)

In November 1936, the Secretary obtained further condemnations—one for about 1,117 more acres of petitioner's land in Mississippi at $3.75 per acre, with like reservation of mineral interests, and one for about 378 more acres of her land there at $2.25 per acre, with reservation of mineral interests for ten years from July 1, 1934 (R. 9, 10)

In March, 1938, the Company conveyed its rights in the reserved mineral interests to another, who thereafter conveyed to petitioner (R. 10). Accordingly, she has all interests remaining in the grantors in these mineral rights, and along with the other stockholders at the time of the Company's dissolution, will have full interest in the lands and

timber, or their value, if the deeds and condemnations are adjudged to have failed (R. 10).

All transactions for these acquisitions, including the condemnations, were prosecuted at the instance of the Secretary of Agriculture allegedly under the Weeks Act (R. 10).

By her Complaint filed June 28, 1945 (R. 73), and again by her Amended Complaint filed July 12, 1945, petitioner contended, for the reasons therein indicated (R. 10, 11), that the Weeks Act is unconstitutional and invalid at law; that irrespective thereof, under its Section 516 (R. 11), no deed or other instrument of conveyance can be accepted or approved by the Secretary of Agriculture "until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams"; that the fulfillment of that requirement constitutes a condition precedent to actual passing of title, whether by deed of conveyance or by decree of condemnation, which has never been fulfilled, and that, therefore, title could not, and did not, pass under the deeds of conveyance, or judgments of condemnation, but remained in the Company as to its lands, and in petitioner as to hers (R. 12, 13). On behalf of herself and others in the class, she offered to repay the amounts received from the United States, with interest, and to reimburse for improvements made, less adjustments for any revenues derived or damages due (R. 13, 14).

The deeds, and judgments of condemnation, provide that in default of certain developmental steps by the grantors, the mineral interests shall at the expiration of the indicated periods accrue to the United States (R. 14); and petitioner alleged that on July 1, 1945, or shortly thereafter, defendants, or some of them, acting under the Department's regulations, would effect public bidding for the granting of

leases on such mineral interests, for operation as though Government-owned, and would take other like steps, to the irreparable damage of petitioner and members of the class (R. 14, 15).

Accordingly, petitioner asked that defendants be restrained from exercising any acts of ownership with respect to the lands or interests, including any steps to place the same on lease; and that the Court adjudge that title did not pass under the deeds and judgments, but remained in the grantors, and that it then accord further incidental, related relief (R. 16, 17).

On September 12, 1945, defendants, not having answered, filed Motion to Dismiss the Amended Complaint (R. 53), which, following oral argument (R. 54-70), was granted January 16, 1946 by the District Court (R. 71), on the ground that the suit is an action against the United States without its consent (R. 70). On appeal such dismissal was affirmed (R. 80).

Reasons Relied upon for Allowance of the Writ

I

Respecting petitioner's contention of unconstitutionality of the Weeks Act, the Court of Appeals ruled:

> "Appellant's position as to the unconstitutionality of the Weeks Act would have to be overruled, for appellant's main contention raises a question that has been too long and too thoroughly settled now to justify discussion" (R. 77).

Therefore, the Court of Appeals has decided a question of substance relating to the construction or application of the Constitution, which has not been, but should be, settled by this Court.

II

Irrespective of the question of constitutionality of the Weeks Act, there is the fact that its Section 516 provides that:

> "No deed or other instrument of conveyance shall be accepted or approved under this Section until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams" (R. 19).

The only legislative action purporting to relate here to the foregoing requirement was as follows:

> "The consent of the State of Mississippi is hereby given to the acquisition by the United States by purchase or gift of such land in Mississippi as in the opinion of the federal government and the state forestry commission may be needed for the establishment of a national forest or forests or reclamation or colonization projects in this region" (Section 6058, Mississippi Code, 1930—R. 51).

Petitioner contends that such State Statute was not a compliance with the above requirement of the Weeks Act for title transfer, because (a) such Statute did not convey legislative consent to acquisition by the United States for the purpose of preserving the navigability of navigable streams, (b) it purported to apply, not to individual, currently proposed acquisitions, but in blanket form to all, in advance, for the limited purpose of national forests, reclamation or colonization, commerce not being considered, (c) it did not identify or describe the acreage in question, as required by the term "such land" in the Weeks Act provision, (d) it purported to delegate legislative power to the Federal Government and the State Forestry Commission,

in derogation of the Constitution of Mississippi, which in its Section 33 provides that the "legislative power of the State shall be vested in a legislature, which shall consist of a Senate and a House of Representatives" (R. 12, 13).

The Court of Appeals ruled thereon as follows:

> "The allegation that Mississippi has not given its consent is negatived by the statute of that State which appellant included as part of her complaint. Its terms are even broader than Congress has required, and certainly appellant may not complain of this" (R. 78).

Accordingly, that Court has decided a question of substance relating to a Statute of the United States, which has not been, but should be, settled by this Court.

III

In the District Court and in the Court of Appeals, petitioner relied upon *United States* v. *Lee,* 106 U. S. 196, 27 L. Ed. 171, 1 S. Ct. 240, decided 1882, in which a suit in ejectment was held to lie to restore the possession held by defendants as officers of the United States, title being adjudged not to have passed to the United States in prior tax sale proceedings, but to have remained in the plaintiff.

However, the Court of Appeals ruled, erroneously, it is believed, that "whatever now remains of the doctrine in the *Lee* case has no applicability to the case at hand, for the rule in that case which appellant seeks to apply in this—even on a state of facts more nearly akin to those in the *Lee* case—must, in the light of later decisions of the Supreme Court, be considered as no longer controlling. See *Morrison* v. *Work,* 266 U. S. 481 (1925); *New Mexico* v. *Lane,* 243 U. S. 52 (1917); *Louisiana* v. *Garfield,* 211 U. S. 70 (1908); *Naganab* v. *Hitchcock,* 202 U. S. 473 (1906)" (R. 79).

Accordingly, the Court of Appeals has not given proper effect to an applicable decision of this Court, and has mis-

conceived the effect of the other decisions of this Court cited by it.

Conclusion

WHEREFORE, it is submitted that this petition for allowance of a writ of certiorari should be granted.

ROBERT M. RIESER,
JOHN WATTAWA,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1194

ALICE MARTENS YOUNG, ETC.,

Petitioner,

vs.

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The opinion of the Court of Appeals appears in the record at pages 76-79, and is not yet reported.

The questions presented, Statutes involved, Statements of Jurisdiction, and of the Case, and Reasons Relied Upon, appear in the foregoing petition, and in the interest of brevity are not repeated here.

Specifications of Error

I

It was error for the Court of Appeals to hold that the United States is an indispensable party, and that since it had not consented to be sued, it cannot be made a party,

and that therefore the action was properly dismissed, notwithstanding that such action (a) challenges not unsubstantially the constitutionality of the Act of Congress under which the defendant officers of the United States have proceeded with respect to the lands involved, (b) in the alternative, makes showing not unsubstantially that in purportedly acquiring such lands for the United States, its officers have failed to observe the requirements declared by Congress in that Act to be indispensable to permit them to act in the name of the United States.

II

(a)

It was error for the Court of Appeals to hold in effect that the Mississippi Act (R. 51) conforms to the requirements of the Weeks Act, even assuming the broad constuction which the Court of Appeals gives to the Mississippi Act.

(b)

It was error for the Court of Appeals to hold in effect that such Mississippi Act is a constitutional delegation of authority under the Mississippi Constitution.

III

The Court's decision is in conflict with the prior and controlling decisions of this Court, and erroneously construes and restricts the scope of decisions of this Court which are either not controlling or inapplicable.

ARGUMENT

I

(a)

The United States is not a necessary party when it is alleged, not unsubstantially, that title to the lands never passed to the United States, but remained in those for whom petitioner sues, because of the unconstitutionality of the Weeks Act, under which all acquisitions were purportedly effected.

Under Clause 17, Section 8, Article I of the Constitution, Congress has the power to exercise exclusive legislation over such District as may become the seat of government of the United States "and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." Although Clause 18 following provides that Congress shall have the power "to make all laws which shall be necessary or proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any Department or officer thereof," it was not contemplated that Congress would use such power to acquire vast areas in the States and to extend Federal Government jurisdiction over them. *Kansas* v. *Colorado,* 206 U. S. 46, 88, 96, 97; 27 S. Ct. 655; 51 L. ed. 956; *Legal Tender Cases,* 12 Wall. 457; 20 L. ed. 287, 309.

Under Amendment 10, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As the Federal Government is one of enumerated powers, Congress cannot grant Federal agencies the

authority to acquire lands in the States for non-governmental purposes; and the exercise by Congress of powers not vested in it by the Constitution is in effect to exercise powers that rest in the States. Moreover, no State can, through its legislature, surrender the powers reserved to the States. *Ashton* v. *Cameron County Water Improvement District No. One,* 298 U. S. 513, 56 S. Ct. 892, 80 L. ed. 1309. Congress and the State legislature are not authorized to consummate treaties for the surrender of a State's reserved powers, to be added to the enumerated powers vested by the Constitution in the United States. *United States* v. *Butler,* 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477; *United States* v. *Constantine,* 296 U. S. 287, 80 L. ed. 233, 56 S. Ct. 223.

Under Clause 3, Section 8, Article I of the Constitution, Congress has the power "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;" and such power has been found to include the authority to deal with navigable waters in the facilitation of interstate commerce, and to take other measures necessary to promote the use of such waters for the public benefit; but Congress may not arbitrarily destroy or impair the rights of riparian owners by legislation having no real relation to the control of such navigation. *United States* v. *River Rouge Improvement Company, et al,* 269 U. S. 411, 419; 70 L. ed. 339; 46 S. Ct. 144. Certainly Congress cannot provide that the Federal Government may acquire land for the purpose of engaging in the timber or mineral-rights businesses.

As shown in the foregoing Petition, belief, or even conviction, as to unconstitutionality of the Weeks Act prevailed at time of passage among able Members of Congress, and has continued to prevail elsewhere, as shown by the recent formal Opinion of the Mississippi Attorney General (See Appendix hereto). Nevertheless, there has never been any

controlling judicial determination, review not having been sought, as it appears, of *Coggeshall* v. *United States,* 95 F. 2d 986, or of the Distric Court decisions, cited by the Court of Appeals (R. 77).

Accordingly, the question of the constitutionality of the Weeks Act, especially as applied in this case, is of very real substance, and in the circumstances the United States is not a necessary party.

> "• • • If an agent of the Government • • • attempts to act under a void or unconstitutional Act of Congress, he ceases to act in an official capacity, and a suit against him is not a suit against the Government. • • • It follows that the exemption of the Government from suit does not exempt or protect its officials when they are proceeding without authority or under an unconstitutional Act of Congress. Otherwise there would be no constitutional limitations, since there would be no way of testing the constitutionality of the challenged procedure. • • • Since the Act of Congress in question is challenged by the plaintiff as unconstitutional, and the constitutionality of said Act is asserted by the defendants, who are within the jurisdiction of this Court and have been served by proper process, this Court has jurisdiction to entertain the suit and must of necessity determine or pass upon the constitutionality of the Act. The question and manner in which it is presented, rather than the ultimate answer, determine jurisdiction."
>
> *State of Oklahoma* v. *Guy F. Atkinson Co.,* 37 F. Supp. 93, 96 (Three-Judge Federal Court), affirmed 313 U. S. 508, 61 S. Ct. 1050, 85 L. ed. 1487.
>
> See also *Philadelphia Company* v. *Stimson, Secretary of War,* 223 U. S. 605, 32 S. Ct. 340, 56 L. ed. 570, affirming 33 App. D. C. 338; *Ex Parte Young,* 209 U S. 123, 28 S. Ct. 441, 52 L. ed. 714; *Cyclopedia of Federal Procedure,* 2d Edition, 1943 (Callaghan and Company), Vol. 1, pages 142, 143.

I

(b)

Assuming Weeks Act constitutionality, the United States is not a necessary party in a suit to declare acts of officers of the United States unlawful and to grant incidental relief, when it is alleged, not unsubstantially, that such officers have failed to observe the legal requirements declared by that statute to be indispensable to permit them to acquire lands in the name of the United States.

The Weeks Act, in its Section 516 (R. 19), expressly provides that:

> "No deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this Section until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams."

Plainly, this Act of Congress prohibits the acceptance of a deed or other instrument before the legislature of the State in which the land lies can sense that this may be done and is satisfied that the land is acquired for authorized purposes. This specific limitation on the power of the Secretary is emphasized by the legislative history of the Act.

The only Mississippi legislative provision relied upon by the Government as complying with the foregoing requirement is the Act approved November 19, 1928, as follows:

> "The consent of the State of Mississippi is hereby given to the acqui tion by the United States by purchase or gift of such land in Mississippi as in the opinion of the Federal Government and the State Forestry Commission may be needed for the establishment of a national forest or forests or reclamation or colonization projects" (R. 51).

But this Act does not constitute a compliance with the requirement of the Weeks Act because (a) such provision does not convey consent to acquisition by the United States for the purpose of preserving the navigability of navigable streams; (b) it purports to apply, not to individual, currently proposed acquisitions, but in blanket form to all, in advance, for purposes wholly foreign to the express purpose declared by the Weeks Act; (c) it does not identify or describe the acreage in question, as required by the term "such land" in the Weeks Act provision; (d) it purports to delegate legislative power to the Federal Government and the State Forestry Commission, in derogation of the Constitution of Mississippi, which in its Section 33 provides that the "legislative power of the State shall be vested in a legislature which shall consist of a Senate and a House of Representatives."

Therefore, such fundamental condition precedent, created by the Weeks Act, has never been fulfilled.

The doctrine that the United States cannot be sued except where Congress has provided, has no application to officers or agents of the United States who, when claiming to hold possession of property for public purposes, are sued therefor by one claiming to be the owner or entitled to possession and asserting absence of power of such officers or agents to act for the United States. The right or title of the United States may be the subject of judicial inquiry under such circumstances, although the United States has not consented to be a party. *United States* v. *Lee*, 106 U. S. 196, 27 L. ed. 171, 1 S. Ct. 240; *Ickes* v. *Fox*, 300 U. S. 82, 97, 57 S. Ct. 412, 81 L. ed. 525; *Philadelphia Company* v. *Stimson, Secretary of War, supra; State of Oklahoma* v. *Guy F. Atkinson Co., supra; Blondet* v. *Hadley*, 144 F. (2d) 370, (C. C. A. 1st 1944; *Correa* v. *Barbour*, 71 F. (2d) 9, C. A. A. 1st 1934); *Cyclopedia of Federal Procedure, supra*, Vol. I, pages 142, 143, and footnotes 30, 31.

II

Even assuming the broad construction which the Court of Appeals gives to the Mississippi Act (R. 51), the latter did not conform to the requirements of the Weeks Act (R. 19), aside from being an improper attempt at delegation of authority under the Mississippi Constitution.

(a)

After referring generally to the Weeks Act, the Court of Appeals finds:

> "Before acquisition, the Act requires the consent of the legislature of the State wherein the land is located." (R. 76)

But such finding is incomplete, and indicates misconception, as the Act requires not mere consent of the legislature of the State, but—fundamentally and vitally—consent of the legislature "to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams." (R. 19) In the absence of full and exact compliance with such requirement, the Secretary of Agriculture stands prohibited from accepting or approving any deed or other instrument of conveyance in any purported acquisition under the Weeks Act. (R. 19)

The Court further observes (R. 77) that petitioner's second ground for annulment of the transaction is "that consent of the Mississippi Legislature never having been obtained, no title passed nor could pass, constitutionally, to the United States." But petitioner's contention in this connection is not that a consent of a kind was not obtained, but that the Legislature of Mississippi has never consented to the acquisition of the lands in question by the United States for the purpose of preserving the navigability of

navigable streams, as expressly required and mandatory under the Weeks Act. (R. 19)

The Court further states that "the unlawful possession, as appellant claims, is solely that the United States were without constitutional power to take title." (R. 78) But petitioner's contention of unlawful possession is based on the further and alternative fundamental ground that irrespective of the issue of constitutionality of the Weeks Act, and assuming such constitutionality, there has not been a fulfillment of the condition precedent under that Act, indispensable to the acceptance by the Secretary of Agriculture of any deed or other instrument of conveyance, and to the passing of title, namely, consent by the State Legislature to the acquisition of such land by the United States "for the purpose of preserving the navigability of navigable streams." (R. 19) The Weeks Act affirmatively declares that until this kind of consent is given, Congress does not authorize possession or ownership by the United States. (R. 19)

The Court of Appeals concludes:

> "The allegation that Mississippi has not given its consent is negatived by the Statute of that State which appellant includes as a part of her complaint. Its terms are even broader than Congress has required, and certainly appellant may not complain of this." (R. 78)

The consent requirement under the Weeks Act is express and unambiguous, and allows no latitude or discretion as to the character or extent of the legislative consent. The terms of such consent may not be broader or narrower than the actual requirement, thereby indulging individual interpretations and misinterpretations, but must comply precisely with the specific requirement, namely, consent by the legislature to the acquisition of such lands for the

purpose of preserving the navigability of navigable streams.

The consent relied upon by the Government does not mention streams, or navigable streams, or navigability, but is limited to "national forest or forests or reclamation or colonization projects." (R. 51) How can a consent be broader in scope, as asserted by the Court of Appeals, which makes no reference to the declared and exclusive purpose under the Weeks Act, but announces purposes entirely unrelated to, and wholly different from, such single express purpose? A national park may, and generally does, embrace a relatively small and compact area which could not materially affect the taxing power of a State, but such would not be the situation with respect to areas dedicated to the preservation of the navigability of navigable streams. In the case at bar, not only are the purported acquisitions extensive, but much of the area has no possible connection with navigability of navigable streams, which only evidence adduced at trial can fully demonstrate. The fact is inescapable that the fundamental requirement under the Weeks Act, namely, consent by the Legislature to acquisition by the United States "for the purpose of preserving the navigability of navigable streams," has been ignored in this case.

The inadequacies and misconceptions in the Court's Opinion were called to its attention in a Petition for Rehearing (R. 81-89), but the same was denied. (R. 89) The District Court reserved all direct comment on this issue of title failure for default of required legislative consent, which was emphasized in the proceedings before it on the Motion to Dismiss, and accordingly this fundamental issue still remains without clear judicial expression.

Where agents of the United States Government, on its behalf, assert title which under the controlling Statutes is expressly forbidden to that Government except on compliance with certain conditions, the agents, such compliance

having failed, are in the position of exceeding their authority and of asserting rights which in the circumstances cannot and do not exist. The assertion of a right claimed to exist, before there has been a compliance with express statutory requirements enabling it to exist, is as ineffective as if no power had been delegated at all. In requiring full and lawful consent from the State whose sovereign domain the Government seeks to invade and diminish, Congress has thereby denied to the public officials the right to acquire property in such domain; and accordingly the Government never acquired the property rights in Mississippi, and the proposed actions of its agents are illegal.

By Act approved June 14, 1934 (see Appendix hereto), Congress reaffirmed the necessity for State consent, in permitting the same to be given for the limited period thenceforth until January 1, 1935, by written statement of consent signed by the Governor of a State, and containing the certification that a majority of the individual members of the current State Legislature had expressed in writing to the Governor their concurrence in, and approval of, such statement of consent, instead of requiring the consent of the Legislature to be expressed by its formal action while in session.

In other words, a consent slightly less conventional than formal action of the Legislative body while in session was declared acceptable in the exigency indicated for the brief period of a little over six months; and as will be observed, even such less formal consent required a written statement of consent signed by the Governor of a State and containing the broad certification indicated, all being still quite far from a consent purportedly emanating from a State Forestry Commission and the Federal Government, on attempted delegation.

It will be further observed that even such less formal consent had to include the certification of the written concurrence and approval of a majority of the individual members of the *current* Legislature, clearly interdicting action to operate *in futuro,* and that the closing words of the Act advert to a consent to the acquisition of "said land" by the United States, signifying a specific consent to the individual, currently proposed acquisition, not a consent purporting to apply in blanket form to all acquisitions, in advance, and before the extent and implications of the grant can be fully known by the Legislature.

Prior to its enactment, this Act was Senate Bill No. 3521, 73rd Congress, 2nd Session; and the necessity for State legislative consent, and the existence of the express limitation upon the basic authority for purchase embodied in the Weeks Act, are further shown by the Report of the Senate Committee on Agriculture and Forestry (No. 1077, 73rd Congress, 2nd Session, to accompany Senate Bill No. 3521, Calendar Day, May 22, 1934).

(b)

Under Section 33 of the Constitution of Mississippi, the "legislative power of the State shall be vested in a legislature which shall consist of a Senate and House of Representatives". Accordingly, the above Mississippi Act (R. 51) improperly sought to delegate legislative power to the Federal Government and the State Forestry Commission.

III

This Court's Decision in United States v. Lee Is Applicable

Petitioner relied below upon *United States* v. *Lee,* 106 U. S. 196, 27 L. Ed. 171, 1 S. Ct. 240, decided 1882. There, the property had been occupied and possessed for more

than ten years by the United States, through the officers and agents charged with its control for public uses. Plaintiff, claiming title under a will, sued defendants as such officers and agents, in ejectment, to recover possession. The title relied upon by them was a tax-sale certificate issued by Commissioners appointed by Congress, the land having been bid in for the United States at such sale; and defendants contended that as the United States could not be lawfully sued without its consent, "no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the Government". On trial, it was found that the title relied upon by the defendants was defective, because of the Commissioners' refusal to permit the owner to pay taxes, when due, otherwise than in person. However, defendants urged that as the property was being devoted to public uses, those so using it under the authority of the United States should not be sued for its possession, even by one able to prove title.

In a comprehensive Opinion, this Court held that the Circuit Court was competent to decide the issues, with the parties before it.

In holding such decision inapplicable at bar, the Court of Appeals states (R. 78, 79):

> ". . . That the facts in that case and this are vitally different is convincingly apparent, for it is obvious that in no sense can the United States or their officers be described as trespassers in the present case. Here, the United States are in possession as holders of the record title through the voluntary acts of appellant and the corporation. The unlawful possession, as appellant claims, is solely that the United States were without constitutional power to take title. But appellant has no greater right to challenge the transaction on that ground than a stranger. She relinquished her rights

ten years ago. *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479 (1938) But we think we need not rely on that principle, nor stop to weigh the factual differences between the Lee case and this, since we also think it is perfectly clear that whatever now remains of the doctrine in the Lee case has no applicability to the case at hand, for the rule in that case which appellant seeks to apply in this—even on a state of facts more nearly akin in the Lee case—must, in the light of later decisions of the Supreme Court, be considered as no longer controlling. See *Morrison* v. *Work,* 266 U. S. 481 (1925); *New Mexico* v. *Lane,* 243 U. S. 52 (1917); *Louisiana* v. *Garfield,* 211 U. S. 70 (1908); *Naganab* v. *Hitchcock,* 202 U. S. 473 (1906)."

In the *Lee* case, title in the United States was claimed, as stated, upon a certificate following a tax sale at which the land was bid in for the United States. Here, title in the United States is claimed following proceedings under an Act of Congress which is unconstitutional, or if constitutional, without compliance with the express requirement in that Act, without which title to the United States stands interdicted (R. 19). Accordingly, the United States or its officers can be also described as trespassers here. Nor is the United States in possession as holder of record title through the voluntary acts of petitioner and the corporation, because it was the Secretary of Agriculture, who, through his agent, announced the desire to acquire these lands for the United States. In addition he threatened petitioner and the corporation, who were unable to litigate with the United States, that unless they so agreed to sell, their lands would be taken through condemnation, simultaneously, however, assuring them that in acquisitions in that area, all former owners would be treated equally in mineral rights reservations (R. 7). However, petitioner and the Company received reservations for only 10 years, while it is now revealed that other corporations and individuals in

Mississippi received reservations for 30, 50, or 100 years, or even in perpetuity (R. 7).

Nor, as appears hereinabove, does petitioner claim unlawful possession solely because the United States was without constitutional power to take title. Even assuming Weeks Act constitutionality, there is title failure, with resulting unlawful possession, for default of the required legislative consent (R. 19).

The Court asserts (R. 78) that petitioner has no greater right than a stranger to challenge on the ground that the United States was without constitutional power to take title, and that "she relinquished her rights ten years ago". However, the assertions of the Court beg the very question which the Court must decide before the Petitioner can be said to be a stranger, or to have relinquished her rights, namely, that the Act of Congress under which the acquisitions were purportedly effected, is unconstitutional, or, if it is constitutional, that the defendants have failed to observe its express conditions, which alone could give them the power to acquire title for the United States.

Morrison v. *Work,* 266 U. S. 481, 45 S. Ct. 149, 69 L. Ed. 394, cited by the Court of Appeals (R. 79), appears inapplicable. There, the lands ceded were the property of the United States, and it had "confessedly, power to dispose of them" (487), with right in the Indians "merely to have the United States administer properly the trust assumed" (488). That suit concerned management and disposition of the lands under the agreement of cession, the lands being admittedly regularly acquired. This Court observed (486) that such suit was "unlike those in which relief by injunction has been granted against the head of an executive department or other officer of the Government to enjoin an official act on the ground that it was not within the authority conferred, or that it was an improper exercise of such

authority, or that Congress lacked the power to confer the authority exercised".

In *New Mexico* v. *Lane,* 243 U. S. 52, 37 S. Ct. 348, 61 L. ed. 588, also so cited (R. 79), the object was to take land from the United States, which admittedly had title, the principal question arising whether the School Land Grant Act of June 21, 1898, "had the quality as a grant of the land, asserted of it" (58), the situation at bar being quite different.

Louisiana v. *Garfield,* 211 U. S. 70, 29 S. Ct. 31, 53 L. ed. 92, also so cited (R. 79) deals solely with naked title, and does not parallel the case at bar. The contention of the United States on demurrer that title never passed *from the United States* appears to be correct in the absence of resolution of the doubt whether Louisiana had not secured a good title by a lapse of five years since the approval, and by operation, of the Act of March 3, 1891. Accordingly, the United States had there a direct legal interest. In the case at bar, however, it is contended, and believed shown, that the title never passed *to the United States,* and that, therefore, it has no legal interest. In *Louisiana* v. *Garfield,* this Court stated (211 U. S. 75) that "we will assume for purposes of decision that if the United States clearly had no title to the land in controversy, we should have jurisdiction to entertain this suit." Questions of fact appear in *Louisiana* v. *Garfield,* so declared by this Court, while in the case at bar all of petitioner's well-pleaded facts stand admitted for the purpose of the Motion to Dismiss.

In *Naganab* v. *Hitchcock,* 202 U. S. 473, 26 S. Ct. 667, 50 L. ed. 1113, also so cited (R. 79) the legal title to all the tracts of lands in question was still in the Government, as this Court observed (202 U. S. 473), while in the case at bar the United States never legally acquired title.

Conclusion

Wherefore, it is submitted that the Petition for Certiorari should be granted.

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Madison, Wisconsin,
JOHN WATTAWA,
1317 F Street Northwest,
Washington, D. C.,
Counsel for Petitioner.

APPENDIX

I

Early House Judiciary Committee Expression of Unconstitutionality of Acquisitions for Purposes Unrelated to Navigability of Navigable Streams

"60th Congress 1st Session House of Representatives
Resolution No. 365

(Report No. 1514)

In the House of Representatives

April 20 (Calendar Day, April 24), 1908—Referred to the House Calendar and ordered to be printed. Mr. Jenkins, from the Committee on the Judiciary, reported the following Resolution:

"Resolved, That the Committee is of the opinion that the Federal Government has no power to acquire lands within a State solely for forest reserves, but under its constitutional power over navigation, the Federal Government may appropriate for the purchase of lands and forest reserves in a State, provided it is made clearly to appear that such lands and forest reserves have a direct and substantial connection with the conservation and improvement of the navigability of a river actually navigable in whole or in part, and that any appropriation made therefor is limited to that purpose.

Resolved, That the bills referred to in the resolutions of the House (H. R. 10456 and H. R. 10457) are not confined to such last-mentioned purpose, and are therefore unconstitutional."

II

Act of June 14, 1934

(48 Stat. 955,Ch. 511)

AN ACT

To facilitate purchase of forest lands under the Act approved March 1, 1911.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

That to allow and facilitate the purchase of forest lands under the provisions of the Act approved March 1, 1911 (36 Stat. 961, U. S. C., Title 16, Secs. 513-521), in States which desire that such purchases shall be made but cannot give their formal consent thereto until the next meeting of their legislative bodies, it is hereby provided that a written statement of consent signed by the Governor of the State prior to January 1, 1935, and containing the certification that a majority of the individual members of the current state legislative body have expressed in writing to the Governor their concurrence and approval of such statement of consent, shall be regarded as fully complying with and satisfying the requirements of that part of section 7 of said Act of March 1, 1911, which provides that no deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under said Act until the legislature of the State in which the land lies shall have consented to the acquisition of said land by the United States.

Approved June 14, 1934.

III

Excerpts from Official STATE OF MISSISSIPPI PAMPHLET, 1944 —"Mississippi Land Purchases by Federal Government —Statement by Gov. Thos. L. Bailey and Attorney General's Opinion to the Governor."

STATE OF MISSISSIPPI
Department of Justice
Jackson, 103

Greek L. Rice, Attorney General

October 5, 1944.

Governor Thomas L. Bailey,
Chairman, State Forestry Commission,
Jackson, Mississippi.

DEAR GOVERNOR BAILEY:

"The acquisition by the Federal Government and its agencies of the natural resources of this State is assuming such magnitude as to demand our serious attention . . . The danger in the movement on the part of the United States is in the circumstance that the acquisition is attended by no reservation under which it may be reacquired by the State; the Government claims to have fee simple title, the right to hold the land in perpetuity; the power of the State to control and to preserve its domain is gone to the extent that its immovable property is taken over by the United States as a sovereign. . . . A State cannot survive without a domain. The land area is limited. It will never be any larger. . . . Our Constitution nowhere gives authority to the legislature to consent to the transfer to another sovereign of any portion of the territory within our boundaries. . . . No power is vested in the legislature to surrender or to authorize the surrender of any portion of our domain to the Federal Government or to any other government. Such transfers not only involve a loss of a portion of the wealth of the State but also a partial surrender of the State's jurisdiction over its own territory. . . . The legislature has not the power to convert itself into an agency through which the State may surrender its power

and its wealth. The legislature is not the State; it is only part of the machinery set up to manage the State's affairs. It has no authority to liquidate the State in whole or in part. Agents appointed to conduct a business do not have power to dispose of it. . . . The preservation of the integrity of the States is necessary to the preservation of the Union. Both are intended to be indestructible. . . . The arresting features of the activities of the Federal Government in acquiring our timber lands is that the changes that are thus brought about are permanent in character; involved a reduction of the State's natural wealth; effect a 'defalcation' from the State's power and sovereignty. . . . The Government takes over the land without making any provisions for tax burdens already put upon the land in a legal way . . . it nullifies the lien on the faith of which securities were sold and in addition takes over the land itself and removes it beyond the reach of State taxation. . . . The control by the United States of large areas of our lands adaptable to the growth of timber may create some benefits to the people of the United States but no benefits of such value as to compensate for the loss to the State of Mississippi and its citizens of our natural wealth. . . . But in addition to two or three hundred thousand acres taken over by the Government for other purposes, it has taken transfers to approximately 1,000,000 acres of land for timber-growing purposes. And my information is that there are plans being formulated under which, if they are adopted and executed, the Government will acquire some 3,000,000 more acres of land for timber-growing purposes. So it appears that if the program is carried out, within a short time, possibly within five years, the Federal Government and its agencies will own lands outright and a part of the mineral deposits in other lands in this State in an aggregate acreage in excess of one-fifth of our entire domain. Chapter 54 of the Laws of Mississippi of 1928, Code Section 4156, purports to give the consent of the State to the acquisition by the United States of lands its representatives may desire to take over where the State Forestry Commission concurs with the National Forest Reservation Commission in the opinion that the land in question is

needed for national forest purposes. . . . I do not deem it necessary to enter here upon an elaboration of the reasons supporting my opinion that the said Act of 1928 is void. It is enough to say that the legislature undertook to vest in the State Forestry Commission far-extending authority of a kind which the Constitution has not expressly or by implication reported in the legislature itself. . . . If the legislature is given no authority to cede Perry County to the United States, it cannot authorize the transfer of the timber lands therein to the United States for timber-growing purposes; and if this cannot be done by a special act of the legislature, it cannot be done by a general act to be applied to special instances by the State Forestry Commission as it sees fit. . . . It is my purpose to question the validity of the transfers that the Secretary of Agriculture has taken to lands in the State for the purpose of growing timber, that is, for inclusion in national forests. Whether the challenge will be made through court proceedings or the matter will be pursued through negotiation and appeals to the legislature and the Congress, I have not determined. But the said instruments of conveyance are of doubted validity and I consider it to be my official duty to bring the issue to a test in the name of the State of Mississippi. . . . The Federal Government as a matter of equity would be entitled to a return of the amount invested in the lands. . . . I respectfully suggest the advisability of the State Forestry Commission refraining from approving in any form any further acquisitions by the Secretary of Agriculture of lands for timber-growing purposes and from further cooperation with the representatives of the Secretary of Agriculture looking to such acquisitions; and that the Commission withdraw any approvals heretofore given . . . in whatever form . . .

GREEK L. RICE,
Attorney General."

STATE OF MISSISSIPPI

Executive Department
Jackson

Thomas L. Bailey, Governor.

Jackson, Mississippi,
November 29, 1944.

To the Members of the Mississippi Legislature.

GENTLEMEN:

"Some months ago my attention was called to the situation created by the transfers to the United States of large areas of timber lands in this State and to the fact that plans for future acquisitions may be in the offing. Later I requested Attorney General Rice to write me as Chairman of the State Forestry Commission, a letter of advice or an opinion as to the source of the power the Federal Government relies upon in acquiring our lands and as to the regularity and legal validity of the procedure in acquiring titles. . . . This opinion of the Attorney General was submitted to the State Forestry Commission at its meeting held on the 12th day of October last, and that body adopted resolutions committing itself to co-operate no further with the representatives of the Federal Government in their enterprise of taking over lands in this State for timber-growing purposes. I think it is your duty and mine to protect and conserve and perpetuate the wealth in the lands within our boundaries; and that we owe this duty not only to the people of our State but to the people of all the states. . . . You and I, vested with authority and charged with responsibility, would not find it easy to justify a calm acceptance by us of any program to effect the transfer to another sovereign of a substantial portion of the State's domain . . ."

THOMAS L. BAILEY,
Governor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1194.

ALICE MARTENS YOUNG, ETC., *Petitioner,*

v.

CLINTON P. ANDERSON, Secretary of Agriculture of the United States, et al.

REPLY BRIEF FOR PETITIONER.

I.

The Court's decision of April 7, 1947, in *Land* v. *Dollar,* No. 207, October Term, 1946, clearly indicates that the Court of Appeals was in error as to the present import of *United States* v. *Lee,* 106 U. S. 196, and the continuing force of the latter as an authority.

In its decision January 6, 1947, in the cause at bar, the Court of Appeals ruled with respect to the *Lee* case, as follows (R. 79):

> " . . . we also think it perfectly clear that whatever now remains of the doctrine in the *Lee* case has no applicability in the case at hand, for the rule in that

case which appellant seeks to apply in this,—even on a state of facts more nearly akin to those in the *Lee* case—must, in the light of later decisions of the Supreme Court, be considered as no longer controlling. See *Morrison* v. *Work*, 266 U. S. 481 (1925); *New Mexico* v. *Lane*, 243 U. S. 52 (1917); *Louisiana* v. *Garfield*, 211 U. S. 70 (1908); *Naganab* v. *Hitchcock*, 202 U. S. 473 (1906)."

In its decision April 7, 1947, in *Land* v. *Dollar* (subsequent to filing of this Petition for Writ of Certiorari) this Court declared:

"Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States* v. *Lee, supra,* has been repeatedly approved. *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446, 452; *Tindal* v. *Wesley*, 167 U. S. 204; *Smith* v. *Reeves*, 178 U. S. 436, 439; *Scranton* v. *Wheeler*, 179 U. S. 141, 152-153; *Philadelphia Co.* v. *Stimson, supra,* pp. 619-620; *Goltra* v. *Weeks*, 271 U. S. 536, 545; *Ickes* v. *Fox*, 300 U. S. 82, 96; *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 50-51. That rule is applicable here although we assume that record title to the shares is in the Commission. In *United States* v. *Lee, supra,* record title of the land was in the United States and its officers were in possession. . . .

"We do not trace the principle of *United States* v. *Lee, supra,* in its various ramifications. Cases on which petitioners rely are distinguishable. This is not an indirect attempt to collect a debt from the United States by preventing action of government officials which would alter or terminate the contractual obligation of the United States to pay money. See *Wells* v. *Roper*, 246 U. S. 335; *Mine Safety Co. Forrestal*, 326 U. S. 371. It is not an attempt to get specific performance of a contract to deliver property of the United States, *Goldberg* v. *Davis*, 231 U. S. 218. It is not a case where the sovereign admittedly has title to property and is sued by those who seek to compel a conveyance or to enjoin disposition of the property, the adverse claims being based on an allegedly superior equity or on rights

arising under Acts of Congress. *Cunningham* v. *Macon & Brunswick R. Co., supra; Minnesota* v. *Hitchcock,* 185 U. S. 373; *Oregon* v. *Hitchcock,* 202 U. S. 60; *Naganab* v. *Hitchcock,* 202 U. S. 473; *Louisiana* v. *Garfield,* 211 U. S. 70; *Morrison* v. *Work,* 266 U. S. 481. And see *Stanley* v. *Schwalby,* 162 U. S. 255, 271-272.

". . . public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. . . . if the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States, suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they are entitled to possession of the shares as against petitioners. . . . We intimate no opinion on the merits of the controversy. We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits."

II.

In its decision March 18, 1946, in *Dollar, et al.* v. *Land, Chairman,* 154 F. (2d) 307 (affirmed by this Court, April 7, 1947, No. 207), the Court of Appeals stated in part (310, 311):

"Of the many legal problems attendant upon the relationship of Government to the citizenry, probably none have been more perplexing or subbornly resistant to precise solution than those arising under the doctrine of sovereign immunity. We will not here attempt an exhaustive review of the authorities, many of which were ably argued before us in the present litigation. They illustrate the great difficulty that Courts have had in applying the oft-stated principle of immunity and

point up the absence of any controlling formula.[6] For purposes of our decision we think it sufficient to set down: (1) an analysis of the doctrine as a preliminary or 'jurisdictional' problem, and (2) an indication of the long standing policy in applying the principle to situations where the governmental undertaking is commercial and corporate in character.

"As to point (1), we are adopting the jurisdictional analysis made by Justice Stephens of this Court in his Opinion (dissenting in part, concurring in part) in *Franklin Tp. in Somerset County, N. J.* v. *Tugwell*, 66 App. D. C. 42, 85 F. 2d, 208, 229. Citing several cases[7] relied upon by the parties in the present litigation, he points out:

"Where a plaintiff asserts that an officer of the Government is acting without power and that therefore his acts are invalid, the Court in determining the preliminary jurisdictional question whether the United States is a necessary party (whether necessary parties are before a Court is, of course, jurisdictional), is confronted with a peculiar procedural problem, or impasse, arising

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"[6] The line of cases relied upon by appellants stems from *United States* v. *Lee*, 106 U. S. 196, where the federal officers were denied immunity from suit. It is true, as the appellees have urged before this court, that in the *Lee* case the government officers came into possession of the property in question by 'force and violence', that the case was an action in ejectment and materially stronger on the question of authority in the officers to do what they did. These distinctions, however, are matters of degree. If it should be found upon the trial of the present case that the defendants acted without authority in the first instance, or have by subsequent conduct overreached their statutory authority, their position becomes the same as that of the officials in the *Lee* case. (See also: *Lane* v. *Watts*, 234 U. S. 525, 540, and *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, 620.) The appellees contend that it is really the interest of the United States that the appellants seek to attack, but we think that as a prerequisite to a showing that the interest of the United States had been invaded, the government's interest must first be established. . . ."

[7] "*Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228; *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135; *Wells* v. *Roper*, 246 U. S. 335; *Lane* v. *Watts*, 234 U. S. 525; *United States* v. *Lee*, 106 U. S. 196; *Transcontinental & Western Air* v. *Farley*, 71 F. 2d 288, certiorari denied, 293 U. S. 603."

> out of the fact that the determination of this question involves passing upon the very question involved in the merits . . . Since a Court must determine at the outset its jurisdiction to proceed, it is compelled to make a preliminary decision for jurisdictional purposes on the ultimate question in the suit, and this notwithstanding the fact that when the merits are heard, it may be compelled to reach an opposite conclusion. The Courts solve this problem by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers—unless such assertions are 'so unsubstantial and frivolous as to afford no basis for jurisdiction. . . .' Citing *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897."

In the case at bar, the contentions of Petitioner of want of power in the officers are certainly not "unsubstantial and frivolous." R. 10-13; 54-70; 81-89. See also Questions Presented, *Petition for Writ of Certiorari*, page 2, and *Brief in Support of Petition for Writ of Certiorari*, pages 15, 18, 20, 24. Accordingly, it would appear that Petitioner fully meets the controlling formula announced by the Court of Appeals, affirmed by this Court, that where a plaintiff asserts that an officer of the Government is acting without power and that therefore his acts are invalid, the Courts, where such assertions are not unsubstantial and frivolous, solve the procedural problem "by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers . . ."

III.

(a)

On Respondents' page 2, it is asserted that the question presented is "whether the United States of America is an indispensable party to a suit wherein the prior owner of lands seeks to have adjudicated as nullities the condemnation judgments and voluntary deeds by which the United

States acquired title to such lands from such owner." Respondents' assertion is based on the erroneous premises that (a) Petitioner and those for whom she sues are prior owners instead of present owners, (b) the deeds were voluntary, and by such deeds and condemnation judgments the United States actually acquired title. Accordingly, Respondents beg the very questions involved here.

Aside from the issue of Weeks Act constitutionality, and assuming the same at this point, it would appear that such question is as follows:

> **When officers of the United States have failed to observe the legal requirements declared by Congress to be indispensable to permit them to acquire lands in the name of the United States, is the latter a necessary party in a suit against such officers to declare their acts unlawful and grant incidental relief?**

(b)

The prayers of the Complaint are somewhat edited, and in addition are set out in reverse order, by Respondents on their page 4.

Actually, they are *ad seriatim* (R. 16, 17):

For the issuance of an injunction restraining Respondents from exercising any acts of ownership as to the lands and interests involved, and from any steps designed to offer or place the same on lease.

For the issuance of an injunction requiring the Secretary of Agriculture (a) to exercise as to such lands and interests the authority conferred upon him in the Act of July 8, 1943 (R. 52), and (b) then to quitclaim such lands and interests to petitioner, for the benefit of herself and members of the class, against refund of consideration paid by the United States.

If the preceding prayer is not granted, or if it is granted only as to (a) thereof, and the ensuing exercise of the Secretary's authority is without the effect of producing such

quitclaiming, then that the Court determine that title did not pass under the deeds and condemnation judgments, but remained with the grantors, and require Respondents to file an accounting for the period of occupancy.

Finally, upon such determination respecting title, and against payment of such net sums as may be due the United States, Respondents be required to deliver to petitioner, for cancellation, the deeds of purported conveyance now at Washington, D. C., and be further required to cooperate in correcting the records in Mississippi, to reflect the true state of the title in such lands and interests.

As asserted, footnote, Respondents' page 4, Petitioner has now abandoned the point as to the statutory duty of the Secretary of Agriculture so to quitclaim (R. 15, 16, 52). At the time of the commencement of Petitioner's suit on June 28, 1945 (R. 73), this contention was open, timely, and believed well founded. The Court of Appeals did not rule on this issue, although clearly presented (R. 15, 16, 52, 62, 88). As the time limit of ten years under the Act of July 8, 1943, for such action by the Secretary (R. 82) appears now to have run respecting the major portion of the acreage (R. 9, 10, 22, 29, 32, 39, 44, 49), Petitioner no longer urges such contention and relief, solely for that reason.

(c)

Petitioner does not concede, as asserted Respondents' pages 5 and 6 that "the Government has a record *legal* title to all of the lands *previously* individually owned by her, and to part of the Miss-Wis Corporation lands by virtue of judgments of condemnation . . .," and that "the balance of the corporation lands were *voluntarily conveyed* to the United States for an agreed consideration." (Italics supplied)

It appears merely that record title to the lands is now in the United States, as was the situation in *United States* v. *Lee*, *supra* (See this Court's decision in *Land* v. *Dollar*, April 7, 1947, which also held that the rule in *United States*

v. *Lee* is applicable in *Land* v. *Dollar* "although we assume that record title to the shares is in the Commission.") And Petitioner's fundamental contention that ownership remained in the corporation and in her, actual title never having passed (R. 13), is hardly an admission by her that lands were previously owned by her, and were conveyed to the United States. Nor is the United States in possession as holder of record title through the voluntary acts of petitioner and the corporation (R. 7; Statement of the Case (a), *Petition for Writ of Certiorari*, page 4; *Brief in Support*, pages 26, 27).

The Complaint does not ask that "the Court adjudge that the title of the United States thus acquired is a nullity" (Respondents' page 6), its basic contention being instead that actual title was never acquired (R. 13, 16). And this Court's aforementioned decision in *Land* v. *Dollar* establishes, at its page 7, the inapplicability of the decisions of this Court (including *Louisiana* v. *Garfield*, 211 U. S. 70) cited Respondents' page 6, the cause at bar also not being a case "where the sovereign admittedly has title to property and is sued by those who seek to compel a conveyance or to enjoin disposition of the property, the adverse claims being based on allegedly superior equity or on rights arising under Acts of Congress."

In *New Mexico* v. *Lane*, 243 U. S. 52, cited Respondents' page 6, the object was to take land from the United States which admittedly had title, and hence it is also inapplicable.

(d)

The United States District Court dismissed the Complaint "wholly on the ground that it is an action against the United States" (R. 70). After quoting from the inapplicable decisions of *Louisiana* v. *Garfield, supra*, and *Morrison* v. *Work, supra*, the Court of Appeals held herein that the United States is an indispensable party, and that since it had not consented to be sued, it cannot be made party, and that therefore the action was properly dismissed (R. 79).

Accordingly, there has been no ruling on (1) whether the condemnation judgments are *res judicata* on the issues of Weeks Act unconstitutionality and lack of required legislative consent, or on any contentions of (2) estoppel through acceptance of alleged benefits, or of (3) laches, or of (4) inability to maintain this suit as a class action. Such contentions were not presented in initial argument (R. 56), and are believed unimportant at this juncture and in the absence of trial upon the merits. However, as Respondents do present them here (6, 7, 8), the following is submitted:

(1)

The condemnation judgments are not *res judicata* because the proceedings in condemnation were merely preliminary to a contemplated conveyance, serving as a negotiation and also in producing a judgment to serve as "other instrument of conveyance." (Weeks Act, Section 516, R. 19) At the conclusion of such proceedings, the fundamental requirement for legislative consent still remained for compliance, and in the absence thereof, the Secretary of Agriculture was powerless to accept title. He could approve and accept, only if facts existed permitting him to do so. The duties delegated to him remain unaffected by findings in the condemnation proceedings, which could not abrogate or abridge such duties, or alter the circumscriptions as to acceptance of title, laid upon him by the Weeks Act. No Court has found, nor is it a fact, that purported acquisitions, embraced in the condemnation judgments, received the legislative consent in the form and manner prescribed in the Weeks Act, and accordingly title did not, and could not, pass, regardless of the form of the proferred instrument of conveyance.

(2)

The options were procured by the Government's agent through threat of condemnation, at inordinately low prices, and upon the assurance that all would be treated equally as to mineral rights, in that none would be permitted to re-

serve for longer than ten years, the period granted to Petitioner and the company (R. 7, 8). Recently, it has been learned that certain others whose lands in Mississippi were then so acquired, were granted mineral reservations therein for 30, 50, or 100 years, or even in perpetuity. (R. 7) There is no showing that these rights reserved to Petitioner and the company have ever been, or could have been, exercised, and in the circumstances there have been no actual benefits to accept. Petitioner offers, on behalf of herself and the others, to repay with interest the payments made, with adjustments for any improvements, revenues, or damages (R. 13, 14)

Title to real estate cannot be acquired by estoppel. *Gilcrease Oil Co.* v. *Cosby*, 132 F. 2d 790, certiorari denied. For estoppel by acceptance of benefits, the party against whom it is claimed should have acted with knowledge of the facts and of his rights (*Buffum* v. *Peter Barceloux Co.*, 289 U. S. 227). Also, the acceptance should not be induced by false representations (*Eppes* v. *Thompson*, 79 So. 611, 202 Ala. 145). Estoppel has no application to a contract which violates an express mandate of the law. *Herkner* v. *Rubin*, 126 Cal. App. 677; *Brown* v. *Columbus National Bank*, 137 Indiana 655.

An estoppel here would allow Respondents to avoid the law and a declared policy of Congress, ignore the rights of a sovereign State and of its citizens, and create an ownership in the Government in defiance of its own laws. Under such circumstances it would be without equity because against public policy.

(3)

The assertion that Petitioner waited nearly ten years to challenge the condemnation judgments or the deeds is incorrect. Her Complaint was filed June 28, 1945 (R. 73), and her Amended Complaint July 12, 1945 (R. 2). She received no moneys until 1937 (R. 14). Payments to the Company

were received in 1936 and 1937, the last about December 31, 1937 (R. 13).

The rights to the 377.86 acres, owned by Petitioner individually, purportedly expired July 1, 1944 (R. 9, 10). However, the rights in the remaining 18,113 acres, were not due to expire until July 1, 1945 (R. 9, 10), and Petitioner's proceeding was instituted prior thereto (R. 2). The judgments of condemnation provided for the Court's retention of jurisdiction [illegible] any further necessary orders (R. 39, 43, 49).

Laches cannot be set up as defense to validate a contract which is against public policy. *Bartlett* v. *Doherty,* 10 F. Supp. 465 (N. H.), 81 F. 2d 920, certiorari denied, *Doherty* v. *Knowlton,* 298 U. S. 676.

(4)

A class action, as here, is authorized by Federal Rule of Civil Procedure 23. Respondents cannot indulge in presumptions of additional facts, but are restricted to those alleged, and deemed under the motion to dismiss to be true.

Where the interests of persons not joined are of the same class as the interests of those joined, and where it is considered that the latter fairly represent the former in the litigation, in which all will have a common interest, the Court will proceed to a decree. *Hansberry* v. *Lee,* 311 U. S. 32. The class suit was an invention of equity to enable proceeding to a decree in suits where the number interested is so great that their joinder as plaintiffs is impracticable. *Hansberry* v. *Lee, supra.*

Respondents do not show, nor affirmatively contend, that Petitioner is not adequately representative.

At the time of the dissolution of the Company in 1938, Petitioner owned about 40 per cent of the outstanding capital stock. (R. 3) She can prove that since the purported conveyance of the lands, their value has increased very substantially, from which it follows that the others holding the remaining stock on such dissolution, or their transferees

would benefit materially if the relief were granted. She can also establish powers of attorney, authorizing this suit, from almost all of such others, or their transferees.

(e)

Respondents contend, page 8, that the constitutional issue is not presented by the pleadings. But see Paragraph XII of the Complaint (R. 10, 11), and argument in the District Court (R. 57). They further assert (8, 9) that it is not alleged that the lands are not of the character to promote navigation. But see final clause, Paragraph XII (R. 11). It is the mineral interests which are importantly involved. In argument below, Petitioner's counsel emphasized that these purported acquisitions were for non-governmental purposes (R. 57). On a trial, Petitioner will be prepared to prove that the lands are not of a character to promote navigation, and any further desired allegations can then be added under Federal Rule of Civil Procedure 15.

(f)

The Act of May 29, 1928, c. 915, 45 Stat. 1010, did not dispense with State consent, as Respondents assert (9, footnote), but merely suspended it as to unacquired lands in the Alabama National Forest, from May 29, 1928, until December 31, 1930. It appears from Senate Report 1071, and House Report 1708, 70th Congress, 1st Session, that an original consent act had been unintentionally repealed by a later act, which was not discovered until 1928 when the Alabama Legislature was out of session until 1931; that in order that pending negotiations for certain acquisitions could be consummated before then in accordance with a program, without calling the Legislature into special session, the State Forestry Commission, the Governor being Chairman, approved the form of a resolution for temporary waiver of the legislative consent requirement, and transmitted copies to the State's Congressional delegation, with

request to secure its enactment by Congress, which was thereafter done; that the initiative came from Alabama, to avoid convening special session, as so appears in the above reports, the waiver being in effect that of Alabama, not of Congress. See also letter, April 24, 1928, from the Secretary of Agriculture to the Senate Committee on Agriculture and Forestry, embraced in aforementioned Senate and House Reports.

In attempting to differentiate this case from *United States* v. *Lee,* 106 U. S. 196, Respondents state (10) that Plaintiff's pleadings in the latter case did not acknowledge any interest of the United States in the property, such interest being asserted by the Defendants. A parallel situation exists here, Petitioner's Complaint fundamentally alleging that the United States has no interest in these lands (R. 13, Paragraph XVI), while Respondents assert otherwise in argument. In the *Lee* case, record title was in the United States and its officers were in possession, as is the situation at bar. The question of title was also necessarily determined in the *Lee* case, it having been found on trial that the United States had acquired no title under the tax sale proceedings, 106 U. S. 196, 204.

In *Land v. Dollar, supra,* this Court ruled further that "if it is decided on the merits either that the contract was illegal or that the Respondents are pledgors, they are entitled to possession of the shares as against petitioners," any joinder of the Government then becoming unnecessary. Such rule should apply in the case at bar if it is decided at trial on the merits that, as alleged in the Complaint, title "remained in said Miss-Wis Timber and Land Co. as to its said lands, and in plaintiff as to her said lands." (R. 13, Paragraph XVI)

Respondents assert, page 11, that Petitioner seeks relief not against individual defendants but an adjudication "that these judgments and deeds *of the United States,* are void," and that this Court's decision in *Land* v. *Dollar, supra,* is inapplicable as that case "did not present an attempt to

cancel deeds or judgments conveying real property to the United States." But such assertions again beg the fundamental question whether the above papers are actually judgments and deeds of the United States, and served to convey any interest at all.

It is asserted finally (Respondents' page 11) that the type of relief requested answers of itself the question whether this is in fact a suit against the United States—that "the rights of the United States are the only rights sought to be put in issue." Similar contention was made in *Dollar* v. *Land, supra,* and in its decision, March 18, 1946 (affirmed, this Court, April 7, 1947), the Court of Appeals in footnote 6, made the following ruling, applicable also at bar:

> " . . . The appellees contend that it is really the interest of the United States that the appellants seek to attack, but we think that as a prerequisite to a showing that the interest of the United States had been invaded, the government's interest must first be established. . . ."

Respectfully submitted,

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740957—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1194

ALICE MARTENS YOUNG, ETC., PETITIONER

v.

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion. The opinion of the court of appeals (R. 76–79) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1947 (R. 80). A petition for rehearing was denied on January 22, 1947 (R. 81–89). The petition for a writ of certiorari was filed on April 3, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States of America is an indispensable party to a suit wherein the prior owner of lands seeks to have adjudicated as nullities the condemnation judgments and voluntary deeds by which the United States acquired title to such lands from such owner.

STATEMENT

The judgment sought to be reviewed affirms an order dismissing petitioner's complaint. The material factual allegations, as they appear from the complaint, may be summarized as follows:

In 1935 the Miss-Wis Timber and Land Company, a Wisconsin corporation of which petitioner was then a stockholder, contracted to sell to the United States approximately 17,050 acres of land in Wilkinson County, Mississippi, with a reservation of mineral interests for a period of ten years from July 1, 1935, and subsequently, for the agreed consideration, executed deeds to the United States covering 14,750.06 acres of the land but reserving the mineral interest aforesaid. The balance of 2,245.93 acres, with a like mineral reservation, was acquired by the United States at the contract price by condemnation proceedings instituted in 1937. In 1938, the Miss-Wis Company conveyed its mineral rights in the lands to petitioner's husband, Edward J. Young, who in

turn conveyed such rights to petitioner and thereafter the corporation was dissolved (R. 3, 8–10).

In 1934 and 1935, petitioner executed options to the United States for the purchase of other land in Franklin and Wilkinson Counties, Mississippi, totalling approximately 1,518 acres, owned by her individually. The United States acquired 1,495.39 acres of such land at the prices named in the options by condemnation proceedings instituted in 1936, mineral rights being reserved to petitioner as to a portion of said lands for a period of ten years from July 1, 1935, and as to the balance for a period of ten years from July 1, 1934 (R. 8–10).

The deeds and condemnation judgments by which the United States acquired title are attached as exhibits to the complaint (R. 22–49).

The complaint alleges that the above acquisitions were made under the provisions of the Weeks Forestry Act, 36 Stat. 961, 962–963, 16 U. S. C. 513–519, and that said Act is unconstitutional (R. 10–11). It is also alleged that there was a lack of proper consent by the State of Mississippi to the acquisition of these lands by the United States, and therefore a lack of compliance with the terms of the Weeks Forestry Act (R. 11–13). Petitioner sues in her own behalf, and, so far as the lands acquired by the United States from the Miss-Wis Company are concerned, she sues on behalf of herself and

other stockholders as a member of such class (R. 3).

The complaint prays that the court adjudge that the United States has no title to the lands under the deeds and condemnation judgments, that title remains in the grantors, and that an accounting be compelled for the period of occupancy by the United States. It is further prayed that the respondents be required to surrender for cancellation the deeds of conveyance to the United States and that the respondents be required "to cooperate in correcting the records in said Counties of Wilkinson and Franklin, State of Mississippi, and in said District Court of the United States, Southern District of Mississippi, to reflect the true state of the title in said lands and interests." In addition to these prayers for adjudication of the title of the Government as a nullity, the complaint asks that the Secretary of Agriculture and subordinate officials named as defendants be enjoined from "exercising any acts of ownership" with respect to the lands or leasing them (R. 16–17).[1]

Respondents moved to dismiss the complaint on various grounds (R. 53). Hearing was had on that motion (R. 54–70) and two days later the district court entered its order of dismissal on

[1] The complaint also alleged that the Secretary was under a statutory duty to quitclaim the lands to petitioner and prayed that he be compelled to do so (R. 15–16). The Court of Appeals ignored this contention, and the point is abandoned in the petition for a writ of certiorari.

the ground "that this is an action against the United States" (R. 70, 71). The Court of Appeals affirmed the order of dismissal stating (R. 77) that "the action is clearly one against the United States." Having concluded that the sovereign immunity from suit barred this action, the court did not pass upon the other grounds urged by respondents to sustain the dismissal (R. 53).

ARGUMENT

It is, of course, axiomatic that the United States cannot be sued without its consent. *United States* v. *Shaw,* 309 U. S. 495; *United States* v. *Sherwood,* 312 U. S. 584. Also well settled is the principle that in determining whether a suit is against the United States, the courts will look beyond the nominal parties to see whether rights, interests, or property of the United States are in fact under attack. *Oregon* v. *Hitchcock,* 202 U. S. 60; *Louisiana* v. *Garfield,* 211 U. S. 70; *Louisiana* v. *McAdoo,* 234 U. S. 627. Accordingly, if the instant action be one to which the United States is an indispensable party, it was properly dismissed since there has been no consent by the United States to its being sued with respect to these lands.

On the facts alleged by petitioner a clearer case of the interests, rights, or property of the United States being attacked is difficult to imagine. Petitioner concedes that the Government has a record legal title to all of the lands previously individually owned by her, and to part of the Miss-Wis

Corporation lands, by virtue of judgments of condemnation in judicial proceedings to which petitioner and the corporation were parties. Also conceded is the fact that the balance of the corporation lands were voluntarily conveyed to the United States for an agreed consideration. Plainly the complaint asks that the court adjudge that the title of the United States thus acquired is a nullity. This cannot be done in this case in the absence of the consent of the United States to be sued. *Stanley* v. *Schwalby,* 162 U. S. 255; *Louisiana* v. *Garfield,* 211 U. S. 70; *New Mexico* v. *Lane,* 243 U. S. 52; *Naganab* v. *Hitchcock,* 202 U. S. 473; *Wood* v. *Phillips,* 50 F. 2d 714 (C. C. A. 4); *Blondet* v. *Hadley,* 144 F. 2d 370 (C. C. A. 1); cf. *Chandler* v. *Dix,* 194 U. S. 590.

In *Louisiana* v. *Garfield, supra,* Louisiana sought an adjudication that it had title to certain lands, and this Court stated that the issue of title, as between the State and the United States, could not be resolved in the absence of the United States as a party, and that questions of law and fact inhered in that issue "upon which the United States would have to be heard." 211 U. S. at 77. This holding was reaffirmed in *New Mexico* v. *Lane,* 243 U. S. 52. So here equally important questions exist upon which the Government should be heard. The following is a listing of some, not necessarily all, of such questions.

(a) Petitioner's contentions that the Weeks

Forestry Act is unconstitutional (Pet. 15–18) and that there was a non-compliance with the state consent requirements of that act (Pet. 18–24) constitute matters which could have been interposed as defenses by petitioner and the Miss-Wis Corporation in the condemnation proceedings. The judgments in those proceedings are therefore *res judicata* of those issues. *Chicot County Dist.* v. *Bank,* 308 U. S. 371, rehearing denied, 309 U. S. 695.

(b) The Government, if a party, could argue that petitioner and the corporation, having accepted the benefits of the transactions, are in no position to challenge the validity thereof. A condemnee who accepts the award cannot later challenge the right to condemn. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581, 598–599; *Wilson* v. *Union Electric Light & Power Co.,* 59 F. 2d 580, 582–583 (C. C. A. 8); *Henry* v. *United States,* 46 F. 2d 640, 642 (C. C. A. 3). The same result follows as to the lands voluntarily conveyed. Cf. *United States* v. *Nudelman,* 104 F. 2d 549 (C. C. A. 7).

(c) Despite the fact that the present challenge to the constitutionality of the Weeks Forestry Act and the alleged insufficiency of the state consent statute were open to petitioner when these acquisitions were made, she allowed the condemnation judgments to become final and waited ten years to challenge them or the deeds. Her action

is barred by laches. Cf. *Holmes* v. *Cummings*, 71 F. 2d 364 (C. C. A. 5); *United States* v. *Nudelman*, 104 F. 2d 549 (C. C. A. 7).

(d) Petitioner cannot maintain the action as a class action for all stockholders of the corporation. Such action is permitted only where the parties bringing the suit "fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest." *Hansberry* v. *Lee*, 311 U. S. 32, 41. The other stockholders may be satisfied with the transactions by which the corporation parted with title to its land. Moreover, the other stockholders not parties could not be compelled to make restitution to the Government, a prerequisite to rescission. *Shields* v. *Barrow*, 17 How. 130, 132. Petitioner's offer (R. 14) to make restitution in their behalf simply constitutes her a volunteer as to any greater interest than she has in the corporation's property as a stockholder.

(e) The asserted constitutional issue is not presented by the pleadings.[2] Petitioner concedes (R. 11 and Pet. 16) that the Weeks Forestry Act is constitutional in so far as it provides for the

[2] The Court of Appeals did not, as petitioner states (Pet. 8), decide this question. It merely indicated how it would decide it if it were necessary, referring to authorities sustaining the Weeks Act. A full examination of the court's opinion (R. 77–78) clearly shows that the single ground of decision was that the suit could not be maintained in the absence of congressional consent.

acquisition of lands in the promotion of navigation. The complaint does not allege that the lands in suit are not of that character. Petitioner's challenge to the sufficiency of the state consent statute (Pet. 18) is likewise groundless. As indicated by the court below (R. 78) the state's consent is even broader than Congress required. Moreover, state consent is not a constitutional prerequisite. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 534.[3]

It is submitted that none of the above questions can be decided behind the Government's back, and that the judgment below is correct on the basis of decisions of this Court, notably *Louisiana* v. *Garfield, supra,* and *New Mexico* v. *Lane, supra.* In each of these cases, it may be noted, a prayer for injunctive relief fell along with the prayer for title adjudication.

Petitioner attempts to distinguish these cases (Pet. 28) on the ground that there the question was whether title had passed from the United States, while here the question is whether title was acquired by the United States. Clearly, the Government interest is as much involved and it is just as important that the United States be a party where the relief sought is an adjudication that judgments of condemnation in favor of the

[3] In one instance, Congress dispensed with this requirement. Act of May 29, 1928, c. 915, 45 Stat. 1010.

United States and deeds of conveyance to the United States are void.

Nor do the cases relied upon by petitioner (Pet. 19, 24–27) sustain her contention. For example, in *Ickes* v. *Fox,* 300 U. S. 82, all that was decided was that suit could be maintained to restrain a federal officer from unlawfully infringing what was recognized and defined by federal legislation as a private property right. Similarly, an alleged unlawful interference with a conceded property right is all that was involved in *Philadelphia Co.* v. *Stimson,* 223 U. S. 605. There was no question in that case of title as between the Company and the Government.

Petitioner's main reliance (Pet. 24–26) is upon *United States* v. *Lee,* 106 U. S. 196, but a careful study of that decision shows it is not in point here. Initially, the two cases are entirely different on the facts. In the *Lee* case, the plaintiff sued Strong and Kaufman as individuals merely for possession (106 U. S. at 210). The plaintiff's pleadings did not acknowledge any interest of the United States in the property, such interest being asserted by the defendants. This Court sustained the suit, but noted (106 U. S. at 222) that the United States was not bound by the judgment. The important thing is that no legal claim of the United States was sought to be adjudicated in that case. The only thing adjudicated was the right to possession as between the plaintiff and

defendants as individuals.[4] In the case at bar, as hereinbefore shown, petitioner's complaint acknowledges that she and the corporation engaged in litigation with the United States as a result of which judgments of condemnation were entered establishing title in the United States to part of the lands, and, as noted, her present contentions could and should have been interposed in those proceedings by way of defense. Also shown by petitioner's complaint is the fact that the corporation executed deeds to the United States conveying the balance of the lands. And finally, petitioner seeks relief not against individual defendants for trespass, as in the *Lee* case, but an adjudication that these judgments and deeds *of the United States* are void. The type of relief petitioner asks answers of itself the question whether this is in fact a suit against the United States. The rights of the United States are the only rights sought to be put in issue. For the same reason, this Court's decision in *Land* v. *Dollar,* O. T. 1946, No. 207, decided April 7, 1947, which rested upon the *Lee* case, does not support petitioner here. That case did not present an attempt to cancel deeds and judgments conveying real property to the United States.

[4] The *Lee* case was simply a local action for possession of real property. The court below did not reach respondents' further contention that, in any event, the instant suit was a local action maintainable only in the jurisdiction where the land is situated.

CONCLUSION

It is submitted that the decision below is correct and the petition for a writ of certiorari should be denied.

Respectfully,

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Acting Solicitor General.
DAVID L. BAZELON,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1194

ALICE MARTENS YOUNG, ETC., *Petitioner,*

v.

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.

BRIEF FOR STATE OF MISSISSIPPI AS AMICUS CURIAE.

GREEK L. RICE,
Attorney General of the State of Mississippi

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

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ALICE MARTENS YOUNG, ETC., *Petitioner*,

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CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.

BRIEF FOR STATE OF MISSISSIPPI AS AMICUS CURIAE.

I.

The State of Mississippi is interested in having determined,

(a) Whether a suit brought against the Secretary of Agriculture of the United States and other officers, denying the authority of the Secretary to acquire the lands in Mississippi involved in this action, is a suit against the United States, without its consent; and

(b) Whether the United States is a necessary party to a suit of this character, when it is alleged, not unsubstantially, that title to the lands involved never passed to the United States, by actions of its officers under the authority of the applicable statutes, but remained in those from whom, purportedly, the same had been acquired by the Secretary of Agriculture in the name of the United States.

II.

The Decision rendered by the United States Court of Appeals for the District of Columbia in this case holding that Section 6058, Mississippi Code, 1930 (assuming its validity under the Constitution of Mississippi), was sufficient to grant consent of the legislature to the Secretary of Agriculture of the United States to acquire lands under the provisions of the Weeks Act, affects the public welfare and interest of the State of Mississippi and its sovereignty.

It is submitted that if it appears that the United States never acquired legal title to the lands in controversy, because of ineffectiveness of said Section 6058, Mississippi Code, 1930 (even if it be constitutional), to grant the legislative consent of the State required under the provisions of said Weeks Act, then, under authority of the decision in Land v. Dollar No. 207, October Term, 1946, in the Supreme Court of the United States (April 7, 1947), it would follow that the United States is not a necessary party to suits of this character.

III.

The rulings made herein by the United States Court of Appeals for the District of Columbia, and the questions based thereon in the petition for certiorari, affect the interests of the State of Mississippi.

IV.

The State of Mississippi therefore suggests that the questions raised by the petition for writ of certiorari be reviewed by this Court.

Respectfully submitted,

GREEK L. RICE,
Attorney General of the State of Mississippi

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PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI.

Petitioner hereby petitions for rehearing on her Petition herein for Writ of Certiorari, and for reasons therefor respectfully shows:

I.

It appears that the Court may not have realized the similarity of the principles governing this case, and also *Land* v. *Dollar*, No. 207, Supreme Court, October Term, 1946, decided April 7, 1947. Although Petitioner has no guide for the basis of the Court's action in not assuming jurisdiction, the considerations held by it as controlling in *Land*

v. *Dollar, supra,* are nevertheless so plainly in conflict with the reasoning of the Court of Appeals in the cause at bar as to establish, inescapably it seems, that on the question of jurisdiction this cause fully qualifies under this Court's Rule 38(5)(c).

This conflict assumes increased importance when considered in connection with the fact that "of the many legal problems attendant upon the relationship of Government to the citizenry, probably none have been more perplexing or stubbornly resistant to precise solution than those arising under the doctrine of sovereign immunity". *Dollar et al.* v. *Land* (Court of Appeals), 154 F. 2d 307, 310, 311. The difficulty so recognized by the Court of Appeals is emphasized, and certainly illustrated, by its decision in the cause at bar.

Thus, as indicated Petitioner's Petition, pages 10, 11, and Brief in Support, pages 24-28, filed herein April 3, 1947, the Court of Appeals ruled, erroneously, as follows: (R. 79)

> " . . . we also think it perfectly clear that whatever now remains of the doctrine in the *Lee* case has no applicability in the case at hand, for the rule in that case which appellant seeks to apply in this—even on a state of facts more nearly akin to those in the *Lee* case—must, in the light of later decisions of the Supreme Court, be considered as no longer controlling. See *Morrison* v. *Work*, 266 U. S. 481 (1925); *New Mexico* v. *Lane*, 243 U. S. 52 (1917); *Louisiana* v. *Garfield*, 211 U. S. 70 (1908); *Naganab* v. *Hitchcock*, 202 U. S. 473 (1906)."

Thereafter, and on April 7, 1947, in *Land* v. *Dollar, supra,* this Court reaffirmed the principles of *United States* v. *Lee*, 106 U. S. 196. It noted no corrosive limitations as announced by the Court of Appeals in the above, but on the contrary reiterated that under circumstances such as those outlined in the complaint in *Land* v. *Dollar* "the rule of *United States* v. *Lee, supra,* has been *repeatedly* approved." (Italics supplied) Moreover, this Court ex-

pressly observed further that the "rule is applicable here though we assume that the record title to the shares is in the Commission."

Comparison of the facts so assumed in *Land* v. *Dollar*, *supra*, with the facts in the cause at bar, shows that what was assumed in the former also appears without dispute here, namely, that while the record title is admittedly in the United States (as it was assumed to be in the Maritime Commission for the United States), in each case the plaintiff claims that public officials are "tort-feasors by exceeding the limits of their authority." Yet, as the record now stands, the complaint in *Land* v. *Dollar* states a cause of action, while in the cause at bar it does not. Therein appears the unmistakable conflict between the decisions of this Court, and the application of the same by the Court of Appeals, which arises from the differing fundamental conception by the Court of Appeals as to the continuing force of *United States* v. *Lee* as an authority.

Any further required demonstration in this connection is believed furnished by the fact, noted in the foregoing quotation, that as authority for holding that the rule in *United States* v. *Lee* must be considered "as no longer controlling", the Court of Appeals relies upon *"Morrison* v. *Work*, 266 U. S. 481 (1925); *New Mexico* v. *Lane*, 243 U. S. 52 (1917); *Louisiana* v. *Garfield*, 211 U. S. 70 (1908); *Naganab* v. *Hitchcock*, 202 U. S. 473 (1906)." Yet, in *Land* v. *Dollar*, *supra*, this Court plainly recognizes the distinguishing characteristics of these very cases, and holds that they are not restrictive of the principles applied in *United States* v. *Lee*, observing that where public officers "unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity", the plaintiff "is not relegated to the Court of Claims to recover a money judgment", and that "if it is decided on the merits that the contract was illegal", the plaintiffs "are entitled to the possession of the shares as against petitioners."

It appears indisputable that in the cause at bar, the officers of the United States failed to obtain the consent of the

State of Mississippi as required by the Weeks Act, so as to render lawful what was attempted to be done to acquire title for the United States. Here also the final support for the conclusions of the Court of Appeals has been entirely destroyed by the later pronouncement of this Court. Accordingly, the Court of Appeals "has not given proper effect to an applicable decision of this Court" under the above cited principles, and this Court should assume jurisdiction to correct the error.

II.

The ruling of the Court of Appeals upon Petitioner's contention of unconstitutionality of the Weeks Act is presented on page 8 of Petitioner's Petition, under Reasons Relied Upon for Allowance of the Writ, as further serving to bring such Petition within this Court's Rule 38(5)(c). When such Petition was filed, the decision of the Court of Appeals had not yet been reported. In the Government's Brief in Opposition, it is asserted, page 8, that contrary to Petitioner's contention, the Court of Appeals did not actually decide the issue of the constitutionality of the Weeks Act.

The advance sheets for the report of this decision (160 F. 2d 225) are now available, having been issued subsequent to this Court's ruling herein on May 12, 1947, and show the following principal decision headnote:

> "The Weeks Act, under which the Secretary of Agriculture is authorized to acquire cut-over or denuded lands within the watersheds of navigable streams in aid of navigation, or in promoting the growth of timber, is constitutional. Weeks Law #4, 5, 16 U.S.C.A. #513; U.S.C.A. Const. art. 1, #cl. 17; Code Miss., 1930, #6058."

It is clear, therefore, that the United States Court of Appeals for the District of Columbia has actually rendered a decision—or by its language has permitted the conclusion to be responsibly drawn that it has—"upon a question of

substance relating to the construction or application of the Constitution, or . . . statute, of the United States, which has not been, but should be, settled by this Court."

III.

The State of Mississippi, by its Brief as Amicus Curiae, filed herein May 5, 1947, advises that the decision of the Court of Appeals in the cause at bar affects the public welfare and sovereignty of the State of Mississippi, and that the rulings of the Court of Appeals, and the questions based thereon presented in Petitioner's Petition, affect the State's interest, and accordingly suggests that such questions be reviewed by this Court.

Respectfully submitted,

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Washington, D. C.,
Counsel for Petitioner.

CERTIFICATE.

The foregoing Petition for Rehearing is presented in good faith and not for delay.

ROBERT M. RIESER,
JOHN WATTAWA,
Counsel for Petitioner.